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Contracts, Sales, Insurance

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CONTRACTS, SALES, INSURANCE

HENRY B. WITHAM*

The case materials in the field of Contracts include those which are normally treated in a law school contracts course, viz., offer and acceptance, consideration, third-party beneficiary, assignment, statute of frauds, interpretation (including parol evidence rule), conditions, breach and discharge, and also quasi-contract cases.

Except rarely, no critical comment on the cases is made with the thought that the reader, if the case is called to his attention, should reach his own conclusions about the rightness or wrongness of any particular decision.

The material dealing with statutes and opinions of the Attorney General is likewise limited in scope of subject matter and treatment. This necessarily excludes a number of Attorney Generals' opinions dealing with the authority of municipal corporations and subdivisions of state government to enter into contracts.

In the field of Sales only a very small number of cases has been decided. Here also no critical comment is attempted.

The treatment of insurance cases likewise involves no critical treatment. The "Indiana Insurance Law" of 1935 has caused a large number of Attorney General opinions. These were summarized if they related to questions as to which a general practitioner might be called upon to render an opinion. Inter-departmental regulations and matters dealing with a single *sui generis* problem are not noted.

CONTRACTS

Res Judicata—Anticipatory Repudiation—Split Causes. *Armstrong v. Illinois Bankers Life Association et al.* 217 Ind. 601, 29 N.E. (2d) 415, (1940) 131 A.L.R. 769 (1940).

Illinois Bankers Life Association issued a policy of insurance October 5, 1927, to one Russell Armstrong providing for life insurance on his life and for total disability. Premiums were separately allocated to each provision of insurance. Insured made a claim for total disability as of June,

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1928, which was disallowed by the Company. The Premiums were not thereafter paid. The Company lapsed the policy for non-payment of premiums and denied any liability thereunder. Insured, on December 31, 1929, sued and recovered damages for breach of the total disability feature of the policy. Thereafter, Insured assigned all his right, title and interest in the life insurance portion of the policy to Gertrude Armstrong who brought action on the policy. The Company pleaded the first judgment i.e., the one in favor of the assured under the disability feature of the policy) as *res judicata*. Held, that there were two separate causes of action and therefore the first judgment was not *res judicata* of the facts in the second action.

The case is a modern application of the old rule of *res judicata* discussed at some length in the case of *Franke v. Franke*.¹ It is important to note that a single insurance policy was allowed to be split into two portions, each a separate contract in effect, so that assignment of one was allowed and judgment on one was no adjudication of the other.

The court discussed the problem of anticipatory repudiation and possibly over-extended the "election-theory" as to anticipatory repudiation. Gavit,² after agreeing with the result that the first judgment was not *res judicata*, said: "The contract in question was a continuing contract, and the repudiation could not be properly classified as an anticipatory breach and clearly constituted a repudiation. The generally accepted rule on this subject is that a repudiation must be accepted as a breach even in the case of an installment contract and that the only cause of action which the promisee has accrues at the time of the repudiation. Thus on the second problem involved, which is again a common type of situation, this decision is questionable."

At page 617 of the opinion, the Court quotes from *Federal Life Ins. Co. v. Maxam*³ as a controlling precedent. One should note that the Court in the *Maxam* case was speaking of an executory contract, although the contract in that case was unilaterally executed as in the instant case. Thus, the instant case is apparent authority in Indiana for the view

1. 15 Ind. App. 529, 43 N. E. 468 (1896).

2. Indiana Pleading and Practice, pp. 786-787.

3. 70 Ind. App. 266, 117 N. E. 801 (1917).

that in unilaterally performed contracts a breachee has an election to sue or to continue his performance as in executory contracts. The case represents no change in Indiana case laws as reflected by the *Maxam* case but is noted because the weight of authority from other jurisdictions appears to be contra.⁴

Accord and Satisfaction. *Karvatsky v. Becker, et al.*, 217 Ind. 524, 29 N.E. (2d) 560 (1940), 131 A.L.R. 1074 (1940).

This case is also noted under the section on Insurance.

Plaintiff, a beneficiary of a life policy, demanded payment from defendants who were officers and directors of an insurance company, an Indiana corporation, by reason of a contract of insurance between the insurance company and one Howland by the terms of which the company agreed that, upon the death of Howland, it would pay to the beneficiary the sum of \$1,000.00. The theory of the case was that defendants were liable because of a statute of West Virginia which imposed a liability upon agents of foreign insurance companies for carrying on unauthorized business in West Virginia. The solicitation for the insurance and the receipt of the policy each occurred in West Virginia. The defendant denied liability, but offered to pay to the beneficiary all sums which Howland the insured had paid as premiums for the certificate, without naming any specific amount. The plaintiff answered saying that, since the Association (defendant) would not pay him what was due, he desired that it send him the amounts that had been paid as premiums. The Association mailed him a check for \$7.00 which, it was stipulated, was the total amount Howland, the insured, had paid. The plaintiff did not cash the checks and from this fact the court finds no satisfaction of an accord and hence no discharge of the Association's obligation.

The facts appear to show a bilateral accord agreement. In the opinion the court said ordinarily either of the parties to an accord agreement is free to rescind the accord at any time before satisfaction. This statement, as applied to bilateral contracts of accord, appears to be new law. True, either party may *breach* the accord but to rescind it is another matter. Because there has been no satisfaction, it does not follow there has been no breach of the accord. The

4. *Supra* n. 2.

plaintiff appears to have breached an executory bilateral accord contract to accept \$7.00 in full satisfaction. If so, the breachee would ordinarily have a remedy either to sue for damages or for specific performance.¹

Possibly this point was not stressed in the brief and argument. If so, one perhaps should not conclude that this case is a precedent for a rule that any accord may be "rescinded" by either party with the result that no cause of action arises from the breach of an accord agreement.

Release, Rescission of—Mutual Mistake. *Crane Company et al. v. Newman*, 111 Ind. App. 273, 37 N.E. (2d) 732 (1941).

Newman was injured by a fall into Crane Company's unlighted elevator shaft. Upon the payment by Crane Company to Newman of \$140.00, Newman signed a release.

Thereafter, Newman discovered injuries more serious than he thought existed when he signed the release and brought an action to recover for the after-discovered injuries. The release was pleaded as a defense. The Court held the facts showed a mutual mistake and thus the release was a voidable contract which could be avoided by either party upon proper procedure.

Rescission of a contract for mutual mistake is common, but a mistake by one party only is not sufficient of itself to make the contract voidable.

The language of the release in question is to the effect that Newman did "release, acquit and discharge . . . from any and all liability, now accrued or hereafter to accrue on account of any and all claims or causes of action which I now or may hereafter have . . . in any way arising from any and all injuries . . . " due to his fall, would appear to make clear that the Crane Company intended to cover *all* injuries whether then known or not. However, the Court bases its decision on *mutual* mistake. Hence one should recognize that no change in the statement of the ordinary rule

1. See *Indiana Farmers Mutual Insurance Co. v. Walters*, 221 Ind. 642, 50 N.E. (2d) 868 (1943), where the Court said "By refusing or failing to pay the agreed amount, be it called an accord or a compromise, the obligor is in no position to complain if the obligee abandons the compromise and resorts to his original cause of action. *But if he chooses to sue on the compromise agreement we see no good reason why the action ought not be.*" (Italics ours) See also Restatement, Contracts (1932) Sec. 417 (c) (d).

has been made but one should at the same time recognize that the case possibly brings general releases within the rule of rescission for *mutual* mistake when the releasor discovers facts after signing the release of which he was unaware when he signed.

Sales—Taxation. *Smith v. Sparks Milling Company*, 219 Ind. 576, 39 N.E. (2d) 125 (1942).

Smith, a baker, contracted with the Sparks Milling Company for the purchase of flour. A paragraph of the contract provided: "It is, therefore, agreed and understood that if, after the date of this contract, the commodities and/or containers, or other items . . . shall become subject to an increase in taxes or to any new or additional tax or taxes other than those included in the price thereof, (if the seller shall be required by law to collect such additional taxes), then, in that event, said increase or additional taxes shall be added to the price hereof; and correspondingly, if any tax included in the price hereof shall be decreased or abated, then in that event, said decrease or abatement shall be deducted from the price hereof."

In accordance with this provision, Smith paid \$1.38 per barrel more for the flour which was the amount of the tax. The Agricultural Adjustment Act was declared unconstitutional and Smith brought the action to recover the amount paid for such tax. Held, recovery allowed.

The Court, after a review of several cases, declared there are two general types of sales contracts which provide for the payment of taxes by the purchaser of goods in the event taxes must be paid. One type includes the tax as a part of the purchase price while the other type separates the tax from the purchase price of the goods and requires its payment by purchaser as a distinct fund separate from the purchase price. In the first type the Court held no recovery of taxes paid is allowed but in the second type of taxes paid by the purchaser is generally allowed when, for some reason, the tax need not be paid to the government by the party who collected it for that purpose.

The Court construed the paragraph set out above to be of the second type and allowed recovery. The complainant alleged he had not passed on the tax to the consumer. Since the Court based its decision on contractual grounds

and not on quasi contract, such an allegation by complainant may not have been necessary as it would appear to be necessary had the basis of recovery been on quasi contract.¹

Construction—Meaning of words. *Haworth v. Hubbard*, 220 Ind. 611, 44 N.E. (2d) 967 (1942), 144 A.L.R. 887 (1942).

In a contract providing for a performance "at any time" the Court held that such words cannot be construed to mean "within a reasonable time". The Court recognized a split of authority on the point but squarely held that the words "any time" mean in perpetuity with no departure from such meaning except to avoid absurd, repugnant or inconsistent results. Dissent by Shake, J. with concurrence by Richman, C. J

Third Party Beneficiaries—Right to Sue on Sealed Contract. *VanOrman v. VanOrman*, 112 Ind. App. 394, 41 N.E. (2d) 693 (1942).

Whether or not sealed contracts are effective in Indiana as at common law appears still to be an open question.¹ But one of the results of an instrument under seal, i.e., that a person who is not a party to the contract cannot sue upon it, was denied in this case of first impression in Indiana. The issue as to whether a beneficiary under a sealed contract could sue upon it was squarely presented and decided, in the following language:

"Persuaded by the reasoning in the cases from which we have quoted, and bearing in mind that it has long been established as the law of this State that the third party beneficiary is the real party in interest, the solution of the question in hand is completed by our statute which carries the following provision: 'Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.' (Sec.) 2-201, Burns' 1933."

1. See *DePauw Plate Glass Co. v. City of Alexandria*, 152 Ind. 443, 52 N.E. 608 (1899), and Woodward, *The Law of Quasi Contracts*, Sec. 24 (1913).

1. Gavit, *Indiana Pleading and Practice*, Sec. 234 (2), (1942).

Contracts: When Written or Oral—Statute of Limitations.

Kirmse v. City of Gary, 114 Ind. App. 558, 51 N.E. (2d) 883 (1944).

The Indiana statute of limitations on contracts not in writing is six years, and on written contracts for the payment of money it is ten years.

Kirmse was appointed as a member of the Gary police department and was notified by letter on January 4, 1926, from the Board of Safety of Gary, of his appointment. The same day he took the oath, furnished bond and began the performance of his duties. On January 23, 1930, he was illegally discharged. In 1939, he commenced this action for breach of contract. The City of Gary pleaded the six-year statute of limitations. Held, that since the contract was in writing, the six-year statute did not apply.

Performance—Impossibility—Knowledge of Promissor. *Ludlow v. Free*, 222 Ind. 568, 55 N.E. (2d) 318 (1944).

What appears to be a first holding in Indiana, although a number of other states hold likewise, is one to the effect that an impossibility of performance does not prevent the formation of a contract nor excuse the promissor for failure to perform if he knew at time of promise that the promise or condition could not be performed, if the promisee was unaware of such impossibility. The promissor, in such a case, is held to have promised an absolute liability free from the impossibility factor.

Acceptance of Counter-Offer. *Foltz et al. v. Evans*, 113 Ind. App. 596, 49 N.E. (2d) 358 (1943).

Evans made an offer in writing to purchase real estate from Indiana Yards, Inc., the owner. The offer provided that it would be void unless accepted in writing. Indiana Yards, Inc., through its agent, Foltz, wrote on the reverse side of the paper containing the offer the following:

"This offer accepted subject to the following conditions.

1. That Herbert S. Evans and wife are accepted by the Prudential Life Ins. Co. as substitute mortgagor thereby releasing present mortgagor of any liability under the law.
2. Allowance for lighting fixtures to be \$40.00 Retail,
Allowance for Wall paper & hanging to be \$60.00
Allowance of Finish Hardware to be \$30.00

Richard G. Foltz."

The conditions set out above were agreed to by Evans and he later obtained a letter from the mortgagee that he would be an acceptable substitute mortgagor.

The Court held that the writing as set out above constituted a counter-offer which was accepted by Evans, the counter-offeree, even though his acceptance were not in writing. The provision in Evans' original offer as regards acceptance in writing did not apply to the counter-offer made by Indiana Yards, Inc., the Court held. This result appears to be familiar and sound. But on the question of what a counter-offer embraces in its scope the Court recognized at least two views: one expressed in the case of *Todorovich v. Kinnickinnie Mut. Loan & Building Ass.*, 238 Wis. 39, 298 N.W. 226 (1941), 135 A.L.R. 818 (1941) wherein it was held that by making a counter-offer, the original offeree rejects the terms of the original offer *in toto*. But the Court did not conceive this to be the correct rule. Instead it said:

"We believe the better rule to be that the counter-offer includes all of the terms and conditions of the original offer not inconsistent with those of the counter-offer in so far as the terms and conditions of the agreement itself are concerned, for it seems to us that any other rule would render most counter-offers entirely nugatory, since few of them undertake by their own terms to cover the entire proposition. In other words, an offer to purchase on certain conditions, accepted subject to new conditions which are in turn accepted by the original offeror produces a contract the terms of which consist of the original offer as amended or changed by the counter-offer. This principle, while not announced, is recognized in many cases."

The case contains some very good statements on various contracts questions which could be profitably read as a refresher, but it is believed the point discussed above is the only phase of the opinion showing a first holding in Indiana.

Quasi Contract Distinguished—Illegality *Moslander v. Moslander's Estate*, 110 Ind. App. 122, 38 N.E. (2d) 268 (1941)

Jane Moslander and Charles Moslander were divorced on December 13, 1905, at which time the custody of Grace Moslander, their child, aged eleven, was given to Jane Moslander, and the custody of George Moslander, their child, aged thirteen years, was given to Charles Moslander. The

parties remained separated during a short period after the divorce. Thereafter, Jane Moslander and her daughter, Grace, returned to the farm and home of Charles Moslander and from that time in 1905, until the death of Charles Moslander in 1940, with a possible exception of two or three months, Jane Moslander lived at the home, performed household work, and occupied the same bed with Charles Moslander. The parties were never remarried. Upon the death of Charles Moslander, Jane Moslander filed a claim against Charles Moslander's estate for services rendered the decedent during his lifetime. The claim was disallowed and transferred to a circuit court for trial. At the close of plaintiff's evidence, defendant's motion for a directed verdict was sustained. On appeal, the decision was reversed and the cause was remanded.

In the opinion the Court expressed itself in part as follows:

"It is our opinion that the minds of reasonable men would differ as to whether the services of appellant were performed under an agreement by which she was to receive compensation therefor, and under such circumstances a trial court could not properly withdraw the case from the jury and direct a verdict. Where a divorced wife returns to her former home and aids, through a long period of years, in the rearing of the children and the accumulation of a large amount of property by the former husband, by performing valuable services, without any legal relationship which will permit her to inherit or receive any of the accumulated property in the event of his death, we cannot say, if we follow the dictates of reason and justice or the common understanding of men, that a presumption will arise that such services were gratuitously performed. Where such a situation exists it is for the jury to determine, from all the facts, conditions and circumstances, whether the parties intended to contract for compensation therefor."

From the above quotation it is not clear whether the decision is based on quasi contract or on contract, but from other language in the opinion one may infer that the first and last sentences of the above quotation are expressed for the purpose of showing that the services were not rendered gratuitously. If so, it seems to follow that the basis of the decision is quasi contract rather than contract.

The Court expressly stated that no contention was raised by the defendant that any illicit relationship existed between the plaintiff and decedent which was a part of the consideration for the performance of household services. Hence one

should not conclude that, if such a contention had been made, the result would have been the same.

The Court pointed out that, in other jurisdictions, on the question whether a woman who in good faith lives with a man under the mistaken belief, caused by his fraud, that they are lawfully married, the woman may recover upon an implied contract the value of the services rendered during the period of the supposed marriage. The theory of these cases is the unjust enrichment of the estate of the supposed husband. The Court recognized that a minority of jurisdictions have denied compensation under similar circumstances upon the ground that the wife's services were performed gratuitously. The Court concluded that the majority view reflected the better reasoning and, even though no fraud by the supposed husband was alleged, remanded the case for new trial.

A further history of this controversy is reported in *Kitch, Administrator v. Moslander*, 114 Ind. App. 74, 50 N.E. (2d) 933 (1943) which is an appeal from the decision reached in the retrial of the case in accord with the remand. In the retrial the question as regards illicit relations was presented to the jury by an instruction which the appellate court approved in the following language:

"Appellant's chief objection to this instruction is that it contravenes that rule of law which precludes recovery upon a contract where part of the services claimed are immoral or illegal on the theory that the court or jury under such circumstances as are presented by the facts of the instant case, cannot separate the moral from the immoral consideration. In using this rule as the basis of his attack the appellant overlooks or disregards the essential element of the rule, i.e., the term 'consideration.' Where the illicit sexual intercourse does not enter into the *consideration* for the contract, such contract is not invalidated by the fact that the parties sustain unlawful relations. *Kurtz v. Frank* (1881), 76 Ind. 594, 40 Am. Rep. 275; *Henderson v. Spratlen* (1908), 44 Colo., 278, 98 P. 14, 19 L. R. A. (N.S.) 655; *Emmerson v. Botkin* (1910), 26 Okla. 218, 109 P. 531, 138 Am. St. Rep. 953, 29 L. R. A. (N. S.) 76, 48 Alb. L. J. 66; 10 Ind. L. J. 279."

The second case is also of interest and importance to lawyers who are employed on a contingent fee basis. The risk of dismissal of a suit after arduous labor by counsel inheres in such arrangements for fees, and the second case should be read for enlightenment on that problem.

Third Party Beneficiary Contract Distinguished from Trust.
Newlin et al. v. Newlin, 114 Ind. App. 574, 52 N. E. (2d) 503 (1944).

Allen Newlin died testate in Illinois and some question appeared as regards the execution of his will. In order to obviate the question, the heirs and beneficiaries conveyed testator's property to the executor, as trustee, by an instrument substantially containing the trust provisions of the will by which the trustee was to pay the indebtedness of the trust estate from the assets of the estate. The trustee promised Theresa Newlin to pay two promissory notes she held against the deceased and she thereupon filed no claim against the estate. The notes were paid in part by the trustee and Theresa sued for balance due, and recovered judgment against the trustee both in his trustee and personal capacity. On appeal, the Court sustained the judgment against the trustee in his trustee capacity but reversed as regards the trustee in his personal capacity. No Indiana precedent is cited by the Court, hence it appears to be a first impression Indiana decision. The Court's language on the point is as follows:

"It makes no great difference whether the trust be regarded as having been created by the will of the testator or by transfer *inter vivos*, but assuming, as the parties apparently have, that the agreement and deed of trust was necessary and that its execution, and acceptance by the trustee, effectuated the trust, we are of the opinion that it did not, so far as appellee was concerned, amount to a contract for the benefit of the appellee as a third party beneficiary, but created a trust relationship not only as between the trustee and the heirs of the deceased, but also as between the trustee and the appellee, for by the agreement the trustee did not assume a personal liability to the appellee in consideration of the transfer of the property, but on the contrary was required to pay the indebtedness from the assets of the trust estate. See American Law Institute, Restatement Law of Trusts, (Sec.) 14. Moreover whether the appellee became a creditor of the trust, or a beneficiary under it, is a question of the intention of the grantors, and we believe that the instrument itself reveals that it was intended to accomplish the result above mentioned. Restatement Trusts, (Sec.) 330h. The appellee manifested her willingness to accept the benefits of the trust when she accepted the trustee's assurances of payment, and neglected to file her claim against the decedent's estate.

"No discretion was vested in the trustee with respect to the payment of the debts owed by the deceased. Given assets for the purpose, he was required to pay them immediately and

unconditionally, and that being true, the appellee as a beneficiary had the right to maintain an action at law to collect, American Law Institute, Restatement Law of Trusts, (Sec.) 198; *Cavanagh et al v. O'Connor et al.* (1920), 189 Iowa 171, 176 N. W. 881, regardless of the existence of equitable remedies."

Oil and Gas Leases—Construction—Implied Covenants. *New Harmony Realty Corporation v. Superior Oil Company*, 108 Ind. App. 668, 31 N.E. (2d) 673 (1941).

The so-called "Indiana Rule" as regards oil and gas leases, set out in *Consumers Gas Trust Co. v. Littler*, 162 Ind. 320, 70 N. E. 363 (1904), which implied a covenant to drill a well, was not extended to a lease which provided in express terms that no covenant implied in law shall change the express terms fixing a definite time within which a well was to be drilled.

Validity—Test for Determining. *Maddox v. Yocum*, 109 Ind. App. 416, 31 N.E. (2d) 652 (1941)

In determining whether or not a contract is invalid because in violation of a statute, it depends upon whether or not the cause of action on the contract is predicated on or arises out of an illegal transaction or is a cause of action collateral to an illegal transaction. The Court adopted the language of a Pennsylvania case as a fair statement of the rule in Indiana, as follows:

The test, whether a demand connected with an illegal transaction can be enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case.

LEGISLATION

Acts 1941, Acts 1943, Special Session 1944. No legislation has been found which appears to change the general law of contracts in relation to offer and acceptance, consideration, formalities, joint and several duties and rights, capacity of parties, third party beneficiaries, assignment, statute of frauds, statute of limitations, interpretation, conditions, discharge, illegality, breach or remedies thereon.

Acts 1945

Capacity of Minors. Chapter 12, by emergency legislation, provides that any person under the age of twenty-one

years authorized to participate in the rights, privileges and benefits conferred by the Federal Servicemen's Readjustment Act of 1944, and the infant wife of any such person, can make effective contracts which are necessary to the full realization of the rights, privileges and benefits conferred under that Act, provided they are otherwise competent to make contracts.

Teacher's Contract — Cancellation Clause — Marriage as Grounds for Dismissal. *Ops. Ind. Att'y. Gen. (1944) p. 341.*

A member of the State Board of Education requested an opinion as to whether or not the following clause inserted in the Uniform Teachers' Contract is binding on both parties:

"Marriage of any woman teacher after entering into a contract to teach in said schools, shall, of itself, operate as a cancellation of this contract from and after date of such marriage without notice from first party; and second party hereby expressly agrees to this regulation and to be bound thereby."

The official opinion pointed out that Burns' 1943 Supp.) Sec. 28-4330 requires all teachers' contracts to be uniform, and in the form prescribed by the State Superintendent of Public Instruction, *without amendment*, and concluded that the clause in the contract prohibiting married women from teaching would be invalid as a contract provision. But, the opinion further stated, if a school corporation had a rule prohibiting married women from teaching, such rule could be enforced, provided notice and hearing were given as required by Burns' (1933) Sec. 28-4308.

1944 Opinions Attorney General, 354.

Assignment of Wages by Employee. *Ops. Ind. Att'y Gen. (1944) p. 354.*

The Commissioner of Labor requested an opinion as to whether or not the Indiana statutes forbid a procedure whereby the employee who obtains tools from his employer is required to sign the following form:

"Notice—You are responsible for the above articles. If they are lost or abused they will be charged to you."

The official opinion cited Burns' (1933) Sec. 40-201, relating to the assignment of future wages, and concluded that the signed form did not constitute an assignment of

wages but instead a mere right of set-off. If the employee acquiesced, at the time of payment to him of his wages, in the retention by the employer of an amount due to the loss of tools, such would constitute a satisfaction of the employer's claim. But, if the employee demanded his wages in full, the statute requires payment in full, leaving the employer to enforce his claim by due process of law.

1944 Opinions Attorney General, 431.

Building and Loan Investments. *Ops. Ind. Att'y Gen. (1944)*
p. 431.

The Supervisor, Building and Loan Division, Department of Financial Institutions, requested an opinion as to whether or not a building and loan association might legally purchase real estate upon which there was an outstanding contract of sale, provided the contract purchaser becomes a member of the building and loan association.

The official opinion cited Burns' (1933 R. S., Pocket Supp.) Sec. 18-2123, relating to investments of building and loan associations, and concluded that a building and loan association may purchase real estate upon which there is already an outstanding contract of purchase, provided the contract purchaser becomes a member of the building and loan association as provided in its by-laws, and the real estate is sold to the purchaser at cost as provided in the statutes.

It was expressly stated that the opinion was not intended to apply to leases with options to purchase.

SALES

Legislation

Sales: Receiver's, Fire, etc., Sales, Regulation of.

Chapter 198, Acts of 1943, provides that a license must first be obtained from the County Clerk before advertisement for a sale, or the sale of goods as insurance, salvage, removal, closing out, going out of business, liquidation, bankrupt, receiver's, mortgage, insolvent, assignee's, executor's, administrator's, trustee's, or creditor's sales or that it is a fire sale. It is provided however that clearance sales or closing out of seasonal merchandise and sales by order of court are not within the scope of the statute's prohibition.

INSURANCE

Receivership—Insurance Commissioner Jurisdiction. *Northland, Trustee v. Lincoln National Life Insurance Co.*, 216 Ind. 689, 25 N.E. (2d) 325 (1940).

Northern States Life Insurance Company had a receiver appointed by Lake Superior Court in 1939; thereafter the receiver contracted with Lincoln National Life Insurance Company to assume obligations of the Northern Company and to have a lien on the "net equity" of policyholders in assets of Northern. Lincoln was to hold legal title to assets with equitable title in a Trustee. Lincoln was to account and furnish statement to the Court, the Trustee and Commissioner of Insurance, and when approved by Commissioner it was to be conclusive and binding. In January, 1939, a report was filed by Lincoln. The Trustee and a policyholder (for herself and others) filed exceptions. Motion to dismiss exceptions on the ground that the Insurance Commissioner had exclusive control. Motion granted below. Appealed. Held, reversed.

When assets of an insurance company are in the hands of an Equity Court, accounting must be made to the Court and the Court may not delegate its duty to Insurance Commissioner. Hence, the Court must first approve the report before it is submitted to the Insurance Commissioner.

Construction—Riders—Signatures. *Automobile Underwriters, Inc. et al. v. Jeanette Camp, by Next Friend, et al.* 217 Ind. 328, 28 N.E. (2d) 68, 128 A.L.R. 1024 (1940).

Where unsigned riders were pasted to policy at time of its delivery, they thus became a part of the policy notwithstanding a provision in the body of the policy to the effect that endorsements must be signed by the assured.

This particular point is noted since it appears to be the first time the exact question has been decided in Indiana.

Definition of Employee. *Hoosier Casualty Co. v. Miers*, 217 Ind. 400, 27 N.E. (2d) 342 (1940).

The Hoosier Casualty Company issued an automobile liability policy to Peterson by the terms of which members of his household and employees of the assured were excluded. Plaintiff Miers was employed by Peterson as bartender from 4 o'clock P.M. to 11 o'clock P.M. While Miers was an invitee of Peterson on a hunting trip, at about 2 o'clock P.M., Peter-

son negligently drove his automobile causing injuries to Miers who then filed suit against the Hoosier Casualty Company based upon its policy of insurance held by Peterson. The Casualty Company defended on one ground (among others) that Miers was an "employee" at the time of the injury and thus was excluded from the benefits of the policy. Held, for plaintiff on the reasoning that "employee", as used in the policy, included only those who, at the time of injury, were under the control of the "employer" in the course of the employment. The court found an analogy in the case of the commission of a tort by an "employee" while outside and separate from his employment and cited *Polk Sanitary Milk Co. v. Berry*, 106 Ind. App. 29, 17 N.E. (2d) 860 (1938) as illustrative. This case presents no departure from case law established before 1940 on this point but does present a first holding in Indiana on the construction of the term "employee" in an indemnity contract.

Contracts—Tender—Rescission. *National Life and Accident Insurance Company v. Ransbottom*, 217 Ind. 452, 28 N.E. (2d) 78 (1940).

Where an insurance policy contract is subject to rescission on the ground that insured was afflicted with cancer at time of issuance of the policy, it is only necessary to offer to restore the consideration to the insured and it is not necessary to pay the consideration into court.

Although the Court stated in the opinion that such a result is clearly discernable from the authorities, the case is noted because it appears to be a first such decision on an insurance contract in Indiana.

Personal Liability Agents and Directors. *Karvalsky v. Becker, et al.* 217 Ind. 524, 29 N.E. (2d) 560, 131 A.L.A. 1074 (1940).

This case is noted also in the section on Contracts.

From an insurance standpoint the case involves the liability of officers of an Indiana Corporation on an insurance policy delivered in the state of West Virginia without complying with the statute of that state authorizing the doing of business there by foreign insurance companies. The statute imposed a personal liability upon the officers and directors of the corporation for the unauthorized business.

The West Virginia statute of limitations on actions for

penalties or forfeitures was one year. The court held that the Indiana statute of limitations was applicable and the limitation in West Virginia was not. See the note in 131 A.L.R. 1074.

Disability benefits—Suicide. *Prudential Insurance Company of America v. Rich*, 222 Ind. 231, 52 N.E. (2d) 624 (1944).

The insured was issued a policy providing for disability benefits. In an action on the policy by insured the insurer defended on the ground that insured's disability was the proximate result of self-inflicted wounds when he was of sound mind. Held, for insured.

The case is one of first impression in Indiana. The Court reviews several cases supporting the contentions of each side and concludes that unless the policy specifies that the insurer will not be liable in the event of suicide or attempted suicide by insured while sane then such a contingency may be no defense.

Process—Jurisdiction of Courts—Service on Insurance Commissioner. *General American Life Insurance Company v. Carter*, 222 Ind. 557, 54 N.E. (2d) 944 (1944).

Where insured, beneficiary and insurer were all non-residents and no contact with the state existed except the service of process upon the Insurance Commissioner under a statute providing that foreign insurance companies doing business in the state should execute a power of attorney authorizing service upon the Insurance Commissioner it was held that service in such a situation was beyond the scope of the statute. The statute was construed so as to provide for such service only in actions arising out of contracts made within the state or with residents of the state.

Statutory Interpretation—Rating Bureau. *Department of Insurance of Indiana et al. v. Merchants Fire Ins. Co. of Indiana—Department of Insurance of Indiana et al. v. Indiana Retail Merchants Ass'n Mut. Fire Ins. Co.*, 57 N.E. (2d) 62 (1944).

An Indiana statute, Burns' Ann. St. Section 39-4310, 1940 Replacement, requires every fire insurance company to maintain, or to be a member of, a rating bureau, and that no company or rating bureau shall charge or fix any rate which

discriminates unfairly between risks in the application of like charges and credits, or which discriminates against risks of essentially the same hazard.

Under this statute insurance companies were allowed to charge less rates than prescribed by the bureau but they were not allowed to change classifications or methods of classifying insurance risks established by the rating bureau.

This case is the first court interpretation of this statute on the question involved.

Taxation of Foreign Insurance Corporations. *State v. Prudential Ins. Co. of America, Newark, N. J.*, — *Ind.* —, 64 N.E. (2d) 150 (1945).

Although this case primarily involves questions of taxation and interstate commerce it was an insurance company that was taxed. One interested in the broad field of law applicable to insurance companies should therefore be familiar with the case.

The question was whether or not the Indiana insurance premium tax upon the privilege of doing business in the state by foreign insurance companies was constitutional under the commerce clause and the equal protection clause of the 14th Amendment in the light of *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L. Ed. 1440 (1944), which held that the business of insurance is interstate commerce.

The Court upheld the tax as not an undue burden upon interstate commerce and as not violative of the equal protection clause of the 14th Amendment.

Notice and Proof of Loss—Condition Precedent Excused. *Guardian Life Insurance Company of America v. Brackett*, 108 Ind. App. 442, 27 N.E. (2d) 103 (1940).

Guardian Life issued a policy to Brackett providing for certain benefits in the event of permanent total disability of the insured. The policy contained a provision fixing the time of payment for such disability at a time subsequent to the receipt of due proof and fixing the time of making due proof at and during the continuance of the policy and before default in payment of premiums. Brackett suffered a sunstroke causing him to become unsound in mind and made no "due proof" of his disability.

The question of whether or not insanity is a sufficient

excuse for the insured's failure to perform the condition precedent of the policy was decided in the insured's favor in the following quotation from the opinion:

"The policy in the instant case contained a provision fixing the time of payment for disability at a time subsequent to receipt of "due proof" and fixing the time of making "due proof" at and during the continuance of the policy and before default in payment of premium. This provision was a mandatory one and required some act to be done as a condition precedent to the right to recover for total disability, and should be "read with an exception saving the rights of the assured from forfeiture for failure to comply therewith where he is totally incapacitated from acting in the matter and the contract of insurance was entered into in contemplation thereof, and that exception became a part of the policy the same as if embodied therein in exact language."

The Court recognized the diverse decisions from other jurisdictions on the point involved and expressly made no attempt to reconcile them. The specific question of whether or not insanity is a sufficient excuse for failure to give "due proof" of disability under the terms of an insurance policy appears not to have been decided before by an Indiana Court. Hence the case appears to be one of first impression by an Indiana appellate court.

Father's Action for Loss of Child's Services. *Automobile Underwriters, Inc. v. Camp et al.*, 109 Ind. App. 389, 32 N.E. (2d) 112 (1941).

Automobile Underwriters, Inc. issued a policy to Summers promising "to pay any loss by reason of liability imposed by law upon the subscriber . . . for damages on account of bodily injury including death resulting therefrom accidentally inflicted or alleged to have been inflicted upon any person." The policy excluded claims for "injuries to the occupants of the insured automobile."

The father of an occupant of Summers' automobile who was injured recovered a judgment against Summers for loss of services of his child. In this action by the father against Automobile Underwriters to have funds applied to the payment of the judgment against Summers, the Court allowed recovery on the ground that the father's cause of action for loss of his child's services is distinct and separate from the cause of action the child may have and hence the clause of

the policy excluding occupants is not applicable to the father's cause of action.

The case is noted because it appears to be a first Indiana decision on the point involved.

Policy—Notice as to Time of Termination—Construction—Waiver Based on Estoppel. *Lincoln National Life Insurance Company v. Sobel*, 110 Ind. App. 331, 35 N.E. (2d) 121, 37 N.E. (2d) 698 (1941).

1. An insurance policy was delivered while subdivision 9 of Sec. 1, Ch. 195, Acts of 1925, was in effect. (Substantially the same provision is found in subdivision 9 of Sec. 151, Ch. 162, Acts of 1935). The statute required insurance policies to contain a provision that the failure to pay any policy loan, automatic premium loan, or interest thereon should not void the policy unless the total indebtedness equaled or exceeded the cash surrender value, and in no event until 30 days after notice thereof had been mailed to insured or assignee. The policy contained the required provision. The insurance company on July 7, 1933, sent the notice. August 7, 1933, was the date the total indebtedness would equal or exceed the cash surrender value of the policy which would lapse the policy if proper notice were given.

On the question as to whether or not the 30-day notice may be given before the date of excess of loan over cash surrender value the Court held the prior notice sufficient. The Court recognized contrary holdings in various jurisdictions but based its conclusion, by analogy, on *Lincoln National Life Insurance Company v. Hammer*, 41 F. (2d) 12 (1930) wherein it was held that promptness of payment of premiums was essential. The Court then concluded that promptness of payment of loans and interest was likewise essential and that the 30-day notice prior to the date of excess of loan over cash surrender value was sufficient.

2. The Court refused to apply the usual rule of construction, i. e., that a policy is to be construed most favorably to the insured because the term in the policy needing construction was taken from the statute. It should be noted that the statute did not require the provision to be contained in policies covering substandard risks which the one in question was. Stevenson, J. dissented on this point.

3. The case also presents a decision on the requirements of waiver in Indiana which in the past have been a bit hazy

due to apparently conflicting decisions. This case holds that a provision in an insurance policy which expressly limits the power to change the terms of the policy to certain designated individuals cannot be waived by agents of the company who are mere solicitors.

Insurance: Due Proof of Disability. *Moore et al. v. Metropolitan Life Insurance Company*, 110 Ind. App. 480, 39 N.E. (2d) 488 (1942).

The Insurance Company issued a 20-year endowment policy to Delbert E. Moore on February 1, 1917. The policy contained a provision that the Company would waive payment of premiums upon "due proof" that insured was wholly and permanently disabled. The only evidence as regards notice or "due proof" of insured's disability was a statement by his mother made to the Company's premium collection agent to the effect that the insured was sick at Camp Shelby. The Court held that "due proof" in a policy meant more than the time when notice must be given. It includes also the substance or subject matter of the disability. The proof must be "of something" and must show that the insured was wholly and permanently disabled and prevented from performance of any work for compensation or profit.

The decision appears to be the first one by an Indiana Court on the specific point.

Vacancy Clause—Failure to Return Premium—Waiver of Right to Forfeiture. *Farmers' Conservative Mutual Insurance Company v. Neddo*, 111 Ind. App. 1, 40 N.E. (2d) 401 (1942).

Insurance company issued a fire insurance policy to Neddo on two buildings. The policy contained a provision voiding the policy if a building be or became vacant or unoccupied and so remain for ten days. One of the buildings burned and after the fire the insurance company first learned that it had been unoccupied for a period longer than ten days. The company however did not return or offer to return the unearned portion of the premium paid by insured. The Court held that the company had waived its right to avoid the policy because of its failure to return or offer to return the premium.

The Court based its decision on *Insurance Co., etc. v. Indiana Reduction Co.*, 65 Ind. App. 330, 117 N.E. 273 (1917) which dealt with a situation where gasoline was kept on the

premises, and concluded the waiver should likewise be effective in a no-vacancy provision even though the breach of the condition was not discovered until after the fire.

Construction of Policy Provisions. *Shadow v. Standard Accident Insurance Company*, 111 Ind. App. 19, 39 N.E. (2d) 493 (1942).

Sec. 1, Ch. 180, Acts Indiana General Assembly 1931, approved March 14, was reenacted as Sec. 177, Indiana Insurance Law, Ch. 162, Acts 1935, Sec. 39-4309, Burns' 1940 Replacement, and contains, among other provisions, the following:

"No such policy shall be issued or delivered in this state to the owner of a motor vehicle, by any domestic or foreign corporation, insurance underwriters, association or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, expressed or implied, of such owner."

Ch. 179, Acts Indiana General Assembly 1931, approved March 13, was reenacted as Ch. 113, Acts 1935, Sec. 47-1036, Burns' 1940 Replacement, and provides that a motor vehicle liability policy may be issued in this state which shall either: (1) Insure the person named therein, "and any other person using or responsible for the use" of a motor vehicle, with the consent, express or implied, of such insured against loss from the liability imposed by law upon such insured or upon such other person for injuries to person or property growing out of the operation of such automobile; or, (2) insure the person named therein against loss from liability imposed by law upon such insured for injuries to person or property growing out of the operation of such automobile.

Plaintiff was injured by the operator of an automobile owned by the West Terre Haute Motor Corporation. He recovered a personal judgment of \$1000.00 against the operator because of his negligence. The West Terre Haute Motor Corporation was not liable for the negligence of the operator because no relationship of principal and agent or master and servant existed between them, although the automobile was being driven with the consent of the corporation.

The West Terre Haute Motor Corporation held a policy of insurance of Defendant, insuring the motor corporation against liability for damages arising out of bodily injuries sustained by any person not employed by the insured as a result of any accident by reason of the ownership, operation or maintenance of any automobile by the assured.

The plaintiff contended that this policy of insurance inured to his benefit by reason of Sec. 39-4309, Burns' 1940 Replacement, set out above.

The Court refused to overrule the case of *Spicklemeier v. T. H. Mastin Co.*, 107 Ind. App. 350, 24 N.E. (2d) 797 (1940), in which it was held that Sec. 39-4309, Burns' 1940 Replacement, afforded protection to the owner of the automobile against such liability as was imposed by law against him. Therein the Court said:

"Liability of the owner is the condition insured against and is the condition precedent on which the obligation of the insurance carrier depends. It was not the purpose of this statute to provide that everybody who might drive the owner's car with his permission, express or implied, should be insured against liability for negligence in its operation."

The Court thus construed two possibly conflicting statutes, originally approved on consecutive days, as being in accord. The practical result of the holding, as regards its effect on motor vehicle insurance, is that omnibus coverage is not required to be read into every policy. A policy insuring the owner only is sufficient under the statutes.

Change of Beneficiary by Divorce. *Herdman v. McCormick et al.*, 111 Ind. App. 169, 40 N.E. (2d) 1009 (1942).

Insured named his wife as beneficiary in a mutual life insurance policy. Five days before insured's death, his wife divorced him and had her maiden name restored. The policy provided as follows:

"And if any person now or hereafter designated by me to receive the death benefit shall not be living, or shall be incapacitated for executing the requisite receipt and release, or if there shall be no such person, the death benefits shall be payable as provided in the regulations of the relief department for such event."

The Court distinguished the case of *Farra v. Braman*, 171 Ind. 529, 86 N.E. 843 (1909) which allowed the divorced wife

to recover under a policy which provided that "death benefits shall be payable to my wife, Eva J. Ried, of Ft. Wayne, Indiana, if living at the time of my death and not withdrawn as my beneficiary, or to such person or persons as I shall subsequently duly designate in writing in substitution therefor, . . .". In the instant case the Court construed the policy provision set out above as containing three conditions which might operate to change a designated beneficiary even though no change in writing were made by the insured. Those conditions are: (1) In the event the designated beneficiary should not be living; (2) in the event the designated beneficiary should be incapacitated; and, (3) in the event there should be no such person. The Court held that condition (3) was applicable and so allowed the parents as second designated beneficiaries to recover.

Beneficiary. *Beene v. Gibraltar Industrial Life Ins. Co. et al.*, ——— *Ind. App.* ———, 63 N.E. (2d) 299 (1945).

The case involves the question as to whether or not a named beneficiary who kills the insured shall forfeit any rights as such named beneficiary. The Court recognized that an "unlawful and felonious" killing is sometimes stated to be the rule, but held that "intentional and wrongful" killing is the proper wording.

Legislation.

Reinsurance—Investments. Chapter 115, Acts of 1941, passed measures relating to the authority of insurance corporations to merge, consolidate and to reinsure.

A summary of these provisions appears in 17 Ind. Law Journal, 169 (1941).

Directors, Qualifications of. Chapter 127, Acts of 1941, amended Chapter 162, Section 89, Acts of 1935, by providing that in the case of a company's writing only physician's or dentists' liability insurance, a director shall be either a policyholder, or one who has had five years or more of actual experience in the management or underwriting of such kind of insurance.

"Indiana Insurance Law," Amendments. Chapter 189, Acts of 1943, amended Sections 151, 153 and 169, the "Indiana Insurance Law," Chapter 162, Acts of 1935, and added five new sections. The changes relate to required policy provisions, deposit of securities, the classification of group poli-

cies and the company's right to select a transition date.

Investments in Policies. Chapter 250 of Acts of 1943 provided that executors, administrators, guardians, trustees, receivers or other fiduciaries shall have power in such capacities to invest in "Life, endowment or annuity contracts of legal reserve life insurance companies duly licensed by the insurance commissioner for the State of Indiana to transact business within the state. The purchase of contracts authorized by this subsection shall be limited however, to executors or the successors to their powers when specifically authorized by will, and to guardians and trustees on authorization of the Court having probate jurisdiction over the guardianship or trust. Such contracts may be issued on the life or lives of a ward or wards, a beneficiary or beneficiaries of a trust fund, or according to the terms of a will, or upon the life or lives of persons in whom such ward or beneficiary has an insurable interest. Such contracts shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person or persons whose funds are invested therein."

This power of investment is in addition to that given by Ch. 149, Acts of 1941.

Group Insurance, What Constitutes. Chapter 311, Acts of 1943, amended Section 166 of the "Indiana Insurance Law," Chapter 162, Acts of 1935, by adding to the classes of group life insurance (1) life insurance covering the members of agricultural cooperatives written under policies issued to the Indiana Farm Bureau Cooperative Association, Inc., or its affiliates, and (2) life insurance covering employees of the Indiana Statewide Rural Electric Cooperative, Inc., and units thereof written under a policy issued to Indiana Statewide Rural Electric Cooperative, Inc.

Chapter 59, Acts of 1945, further amended Section 166 of Chapter 162 by adding to the classes of group life insurance written under a policy covering the executive, supervisory, sale and professional employees of bona fide members of any voluntary industrial association under a policy issued to such association.

Workmen's Compensation, Premiums for. Chapter 167, Acts of 1941, amended Sections 13, 14, 19 and 21 of Chapter 323, Acts of 1935, so as to provide that the Department of Insurance may provide a maximum premium rate for workmen's compensation.

Old Age Assistance, Liens Against. Chapter 201, Acts of 1941, repealed Sections 44, 45, 46, 47 and 48, and amended Section 38 of Chapter 1, Acts of Special Session of 1936, so as to remove the lien on the estate property of one granted old age assistance.

Foreign Fees and Taxes of Domestic Companies. Chapter 123, Acts of 1945, empowers every domestic insurer to pay taxes and fees imposed by any state or the District of Columbia and directs that no officer, director or trustee of any insurer shall be subject to any personal liability by reason of any such payment provided the payment is prior to a determination of invalidity of the tax by a court having final appellate jurisdiction.

The Department of Insurance. Chapter 351, Acts of 1945, recreated "The Department of Insurance" and carried forward the powers, rights, duties and liabilities of "The Department of Insurance" which was established as a division of the Department of Audit and Control of the State of Indiana, by the insurance law, Chapter 162, Acts 1935. Apparently some doubt existed as to the status of The Department of Insurance which was caused by administrative legislation since 1935. Hence, the 1945 legislation was enacted. One essential change from the 1935 act was to take from the Governor and give to the Commissioner of Insurance the power to remove the actuary and other employees of the Commissioner's office.

Withholding for Teachers' Group Insurance. Chapter 84, Acts of 1945, authorized school boards upon written request of teachers to withhold from salaries amounts of money to pay for group insurance, provided that any dividends shall be paid to the teachers.

Group Insurance for State Guard. Chapter 134, Acts of 1945, authorized the Adjutant General, with the Governor's approval, to obtain group insurance for members of the military forces of the state.

Legal Reserve Life Companies, Investments. Chapter 175, Acts of 1945, is the latest legislation listing investments of domestic life insurance companies and contains too much detail for summary. The whole of Chapter 175 should be examined.

Fraternal Beneficiary Associations, Investments—Certificates, Valuation of—Benefits for Children. Chapter 149,

Acts of 1945, amended Section 189, "Indiana Insurance Law," Chapter 162, Acts of 1935, so as to enlarge the class of securities in which fraternal beneficiary associations may invest funds. Chapter 162, Acts of 1935, restricted such investments to securities permitted by the laws of Indiana for the investment of the assets of life insurance companies for reserve deposits. Chapter 149, Acts of 1945, deleted the words "for reserve deposits."

Section 193 of "Indiana Insurance Law" was also amended by Chapter 149, Acts of 1945, by deleting from Section 193 the following:

"The rate of interest used in the valuation shall not be greater than the net rate which the society earned on its admitted assets during the year preceding the date of the valuation less one-fourth of one per cent."

Section 200 of "Indiana Insurance Law" was also amended by Chapter 149, Acts of 1945, by removing the limitation on the amount of insurance to be issued to children under 16 years of age.

Opinions of the Attorney General.

Authority of Company to Take Promissory Notes for Stock Sales. Ops. Ind. Att'y Gen. (1940) p. 7. An insurance company does not violate the Indiana Insurance law of 1935 by taking promissory notes for its sales of stock provided that proper action has been taken by the insurance company authorizing the receipt of notes in payment for stock and that there is reasonable ground for believing such notes are good and collectible and of the value for which they are received.

The opinion directed attention to Section 74 of the Indiana Insurance Law, Chapter 162, Acts of 1935, which established the minimum amount of capital stock which must be paid up in money in order to authorize the company to write certain types of insurance. Promissory notes are not, in the Attorney General's opinion, the equivalent of cash which is required by Section 74.

Reinsurance—Charter Rights, Transfer of. Ops. Ind. Att'y Gen. (1940) p. 15. Members of an insurance company organized under Chapter 195, Acts of 1897, have no power to transfer charter rights. It was also ruled that an expression by five members in an assessment insurance company to con-

tinue their insurance in the original company is not sufficient to continue the original company under Section 1, Chapter 195, Acts of 1897.

Ownership of Own Stock by Insurance Company. Ops. Ind. Att'y Gen. (1940) p. 27. Section 147 of the "Indiana Insurance Law" means that a life insurance company may not invest in its own stock unless it is accepted in good faith to protect the company's interest either in payment of or to secure a debt due the company.

Foreign Insurance Companies, Powers of. Ops. Ind. Att'y Gen. p. 66. Section 227 of the "Indiana Insurance Law" of 1935 means that foreign insurance companies, licensed to do business in Indiana before the passage of the "Indiana Insurance Law" of 1935, may continue to write the kinds of insurance provided for in their charters or articles of incorporation.

Power of Farmers Mutual Company to Insure Urban Property. Ops. Ind. Att'y Gen. (1940) p. 128. Under Section 6, Chapter 145, Acts of 1919, as amended by Section 3, Chapter 243, Acts of 1927, mutual farm insurance companies may insure property situated in other than rural districts, including villages or unincorporated towns, provided that the property insured is not only "owned principally by farmers" but also that it "has some such relation or connection with farming interests as naturally to fall within the category of farm property even though not strictly such or used in connection with actual farm operations."

Life Insurance Broker Not Authorized. Ops. Ind. Att'y Gen. (1940) p. 191. The "Indiana Insurance Law" of 1935 means that the law does not contemplate nor authorize an insurance broker, either as a corporation or a natural person, to write life insurance.

"Fleet Policy" Coverage. Ops. Att'y Gen. (1940) p. 198. Section 178 of the "Indiana Insurance Law," providing that school buses, even though operated by owners under contract to use them exclusively for school purposes and under the control and direction of school authorities, could not be included or insured in a "fleet policy" along with a fleet of motor vehicles owned by school authorities.

Authority of Political Sub-Divisions to Purchase Insurance Against Public Liability. Ops. Ind. Att'y Gen. (1940) p. 216. Chapter 245, Acts of 1935, does not impose any liability

upon the state or its sub-divisions for the tortious acts of its agents employed in a governmental capacity, and since there was no state statute imposing such liability then the purchase of insurance against such non-existent liability would not be authorized and could not, if purchased, be legally paid for.

Department, Jurisdiction of. Ops. Ind. Att'y Gen. (1941) p. 78. In an opinion to the Insurance Commissioner, the Attorney General construed the "Indiana Insurance Law," in an opinion analyzing several cases from other jurisdictions, to the effect that the Indiana Department of Insurance has jurisdiction in rate-making under the "Workmen's Compensation Rating Bureau Law," Chapter 323, Acts of 1935.

He overruled, in part, the opinion of December 10, 1938, and held that a stock company is authorized to write participating policies.

Right of Commissioner to Deny Issuance of Permit. Ops. Ind. Att'y Gen. (1941) p. 144. Section 71, "Indiana Insurance Law," Chapter 162, Acts 1935, means that no limit was set by the statute upon the period of time which may elapse between the date that the Articles of Incorporation are approved by the Secretary of State and the date on which the \$10,000.00 as surety is posted with the Insurance Department. He held that the Legislature did not expressly or impliedly vest in the Insurance Commissioner the discretion to deny the issuance of a permit to complete organization upon a finding that the incorporators had violated the Insurance Code, and that the Commissioner may accept the \$10,000.00 and issue a permit to complete the organization in spite of his knowledge that stock had been sold in violation of the Insurance Code; provided that conditions precedent to the issuance of such permit had been complied with.

Paid-In Capital Stock Requirement. Ops. Ind. Att'y Gen. (1941) p. 252. Section 74 of the "Indiana Insurance Law," Chapter 162, Acts of 1935, means that the entire amount of stock, appraised at par, must be subscribed and paid for as a requisite to the taking on of another line of casualty insurance. The statute is not complied with by the realization of the prescribed amount by the sale of stock at a premium.

The opinion distinguished "capital" from "capital stock" and held that, generally, profits and surplus earnings do not constitute "capital stock" or "capital" as the words are used in Section 74 of the "Indiana Insurance Law."

Merger Rights. Ops. Ind. Att'y Gen. (1941) p. 336. Section 115 of the "Indiana Insurance Law" means that a charter of an Indiana company cannot be expanded by merging with a foreign fraternal benefit association. Consequently, an Indiana stock legal reserve company merging with a fraternal assessment association may not, after the merger, exercise the association's right to make assessments or levy liens.

Group Policy, Validity of. Ops. Ind. Att'y Gen. (1941) p. 338. Section 166 (b) (4) of the Indiana Insurance Code, Chapter 162, Acts of 1935, means that a group creditors' policy where the insurance is limited to the first five years of loans, even though the life of the loan is twenty years, is valid.

Premium Tax on Insolvent Company. Ops. Att'y Gen. (1941) p. 361. The Attorney General held that the Indiana privilege premium tax was not to be charged upon premiums collected by an Illinois insurance company charged by court order to collect such premiums on outstanding policies of an insolvent Illinois insurance company which had been authorized to and did engage in business in Indiana.

Rates—Expense Ration—Durations from Experience Rate—Minimum Premiums. Ops. Ind. Att'y Gen. (1941) p. 427. Section 1 of Chapter 167, Acts of 1941, means that a company is not prohibited from charging a premium rate less than the maximum rate approved by the department and that there is no statutory restriction upon the companies requiring the same premium rate to be granted all similarly situated.

He also held that under Section 2 of Chapter 167, Acts of 1941, it is mandatory that each company file with the Insurance Department a schedule of its expense and that the Department is to approve any charge made to cover expenses before they become effective, but, he held, the Statute does not require that the expense charge, when so approved, shall be used on every risk written by the company. The legislative intent was to permit companies to exercise the widest latitude in the matter of cutting rates below a maximum premium rate approved by the Department.

Section 3 of Chapter 167, Acts of 1941, was construed to mean that the Department is expected to approve deviations from the experience rates promulgated by the Bureau for individual risks.

Section 4 of Chapter 323, Acts of 1935, was construed to mean that the Workmen's Compensation Rating Bureau shall establish minimum premiums, and he defined a minimum premium in workman's compensation insurance as the lowest amount for which a policy may be written for any period not to exceed one year and distinguished a "minimum premium" from "premium rate."

County Farmers' Mutual Insurance Companies, Reports of. Ops. Ind. Att'y Gen. (1942) p. 191. Section 39-2014, Burns' Indiana Statutes, 1940 Replacement, means that county farmers' mutual fire insurance companies, except companies organized by special charter, are required to make and file annually with the Commissioner of Insurance such a report as he may require. He pointed out that Chapter 140, Acts of 1915, does not deal with county farmers' mutual fire insurance companies.

Classification of Insurance Agents. Ops. Ind. Att'y Gen. (1943) p. 50. Section 209 of the "Indiana Insurance Law" imposes an unconstitutional regulation, in that it classified insurance agents upon the sole basis of the method of payment for insurance. Part of Section 209 provides that only those representatives of insurance companies may qualify for a license who operate "on a commission basis only." This provision, in the Attorney General's opinion, was arbitrary and a violation of both the Indiana and the U. S. constitutions.

Burial Associations. Ops. Ind. Att'y Gen. (1943) p. 594. Section 11, Chapter 165, Acts of 1939, means that a contract by an Indiana funeral director with a foreign insurance company, whereby the funeral director may handle all the funerals of policy holders of such insurance company in his territory, comes within the prohibition of the statute and is therefore illegal.

Power of Municipal Corporations to Pay Premium on Group Policies. Ops. Ind. Att'y Gen. (1944). p. 394. It is not legal for cities, counties, townships or school districts to buy group insurance for their teachers and employees and pay all or part of the cost. Also, there is no authority to make involuntary deductions from the salaries of such employees. He pointed out that he did not mean to imply that a voluntary purchase of group insurance by any particular group of public employees was illegal, provided the employees paid the premiums themselves. And he further indicated that voluntary check-off for insurance premium would be valid.

